No. 82-1262

In the Supreme Court of the United States

OCTOBER TERM, 1982

LUTHER ALBERT JAMES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether there was sufficient evidence to establish that petitioner conducted, financed, managed, supervised, directed or owned all or part of an illegal gambling business, in violation of 18 U.S.C. 1955.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 19) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 1982, and the petition for rehearing was denied on January 4, 1983 (Pet. App. 20). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Kentucky, petitioner was convicted on one count of owning an illegal gambling business, in violation of 18 U.S.C. 1955 and 2.[1] Petitioner was

[1] A second count, which charged petitioner with a violation of the Travel Act, 18 U.S.C. 1952, was dismissed by the district court.

sentenced to two years' imprisonment and fined $20,000. The court of appeals affirmed (Pet. App. 19).

The evidence at trial showed that between November 1, 1979, and May 21, 1980, an illegal gambling business involving the use of video-display poker machines was carried on in Jefferson County, Kentucky. Under the scheme, machines owned and maintained by James Vending Corporation were installed in various taverns, which made cash payoffs to winning players in lieu of merely allowing the players additional free playing time.[2] The profits from the machines were split evenly between the taverns and James Vending Corporation. (2 Tr. 219-225, 241-248, 254-257, 262-264; 3 Tr. 270-274, 283-285, 295-297, 303-308, 313-316, 319-322, 325-326.)

For his part, petitioner was the founder, president and 40% owner of James Vending Corporation (5 Tr. 636). Petitioner's wife owned an additional 35% of the corporate stock and served as the company's secretary-treasurer. Apart from petitioner and his wife, the corporation employed only 11 or 12 persons (5 Tr. 568-570).

On May 21, 1980, a number of video-display poker machines and various records of James Vending Corporation were seized pursuant to federal search warrants. Petitioner was present at three locations where the warrants were executed. At one location petitioner advised a barmaid not to say anything to the FBI agents and contested the FBI's right to seize the machines (5 Tr. 643-644). At another location petitioner identified the machines as his and indicated that he wanted to see his seized machines in

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[2]The machines were fitted with "knock-off" switches that permitted bartenders to eliminate free playing time when payoffs were made so that the machines were ready for play by a new customer. An expert witness testified that such switches are characteristic of video gambling devices (2 Tr. 115-120, 136).

order to copy numbers from them (5 Tr. 651-652). And, at the offices of the James Vending Corporation, the officer executing the warrant observed that upon his arrival petitioner examined the search warrant and took charge of the premises from the manager. Noting that only a portion of the records on the premises was covered by the search warrant, petitioner proceeded to identify those records for the agent (5 Tr. 669-670). Another officer testified that the manager would not open the safe without petitioner's express permission (5 Tr. 681-682, 684).

A minority stockholder in James Vending Corporation testified that he had seen petitioner reviewing the weekly deposits from the machines. On occasion, petitioner complained that the "take" was too small and that the machines were paying out too much (4 Tr. 530-531). That stockholder also testified that no dividends were paid on his stock and that he had never received notice of any shareholders' meetings (4 Tr. 511, 539). A bartender at one of the taverns where some of the video-display poker machines were located testified that on an occasion when a machine broke down she called petitioner, whose office was upstairs (3 Tr. 339). Finally, an employee of James Vending Corporation testified that if he received conflicting instructions from the manager and petitioner, he would follow those of petitioner (4 Tr. 552).

ARGUMENT

Petitioner concedes (Pet. 6-7) that the evidence disclosed the existence of an "illegal gambling business" (18 U.S.C. 1955) that involved five or more persons and that was in substantially continuous operation for more than thirty days. He argues, however, that the evidence was insufficient to show that he participated in the illicit business (Pet. 12-15). This fact-bound question, resolved against petitioner

by both courts below,[3] warrants no further review by this Court. See *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635-636 (1967). In any event, when the evidence is considered in the light most favorable to the government (see *Glasser* v. *United States*, 315 U.S. 60, 80 (1942)), there is no doubt but that it is sufficient to support petitioner's conviction.

As this Court has recognized, 18 U.S.C. 1955 "proscribes any degree of participation in an illegal gambling business, except participation as a mere bettor." *Sanabria* v. *United States*, 437 U.S. 54, 70-71 n.26 (1978). The statute is designed to reach those like petitioner who "finance[], manage[], * * * or own[]" a gambling enterprise. In light of the undisputed evidence that petitioner was the principal stockholder and chief executive officer of the small, family-dominated corporation that owned, installed, maintained, and profited from the video-poker machines, there is no merit to the contention that the government's proof failed to satisfy the statutory elements.[4]

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[3]In affirming petitioner's conviction the court of appeals rejected his sufficiency claim (Pet. App. 19) and the trial judge denied his motion for acquittal (5 Tr. 780).

[4]Although petitioner distanced himself from the day-to-day operations of the gambling enterprises, his own words and conduct demonstrated his knowing participation in the scheme. Thus, petitioner reviewed weekly income reports from the video-poker machines and complained that the "take" was too small (see page 3, *supra*). Moreover, during the raids to seize the machines and corporate records, petitioner variously instructed a bar employee not to speak to FBI agents, contested the agents' right to seize the machines, negotiated with FBI agents over which records would be seized and generally took charge of the officers of James Vending Corporation (see pages 2-3, *supra*). In short, petitioner demonstrated that he was an active owner-operator of a business that illegally operated video-poker machines. No more was required to sustain his conviction under Section 1955.

Nor is there merit to petitioner's claim (Pet. 15-16) that the instant decision is in conflict with *United States* v. *Boss*, 671 F.2d 396 (10th Cir. 1982),[5] in which the court of appeals required proof of a defendant's "actual involvement in the gambling operation" through the performance of "a necessary function for the illegal gambling business" (*id.* at 400).[6] There, in the course of determining the existence of the five-person jurisdictional requirement, the court held that several barmaids, who periodically serviced the back room of a nightclub where gambling was taking place, were not

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[5]Petitioner cites (Pet. 16) a number of cases from the Sixth Circuit that he contends are in conflict with the instant case (Pet. 16-17). If such intracircuit conflict exists, it is for the court of appeals, not this Court, to resolve. Cf. *Davis* v. *United States*, 417 U.S. 333, 340 (1974); *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

[6]Petitioner also asserts (Pet. 17-18) that the instant decision conflicts with *United States* v. *Sherpix, Inc.*, 512 F.2d 1361 (D.C. Cir. 1975), and *United States* v. *MacAndrews & Forbes Co.*, 149 F. 823 (C.C.S.D.N.Y. 1906), "as to vicarious liability of corporate officers, directors and shareholders for the criminal acts of their corporation." Both cases are wholly inapposite, as the statutes involved in those cases do not criminalize ownership, financing, management, supervision or direction of an illicit business, as does 18 U.S.C. 1955. In any event, as noted above, there was evidence that petitioner was personally involved in directing the gambling business, and neither of the courts below indicated that it was relying on a theory of vicarious liability.

Although it is not raised as one of the questions presented in the petition, petitioner contends (Pet. 10) that the testimony of certain officers should not have been admitted in evidence because those witnesses recited statements made by petitioner that were not produced by the government in pretrial discovery. Petitioner's claim that Rule 16(a)(1)(A), Fed. R. Crim. P., mandates that this testimony be stricken was properly rejected by the district court (6 Tr. 880, 882, 896). First, petitioner's statements were not made during official interrogation and thus are not covered by Rule 16(a)(1)(A) (see 6 Tr. 867, 876, 878). In addition, no objection was made during the officers' testimony and petitioner's motion to strike was not made until the close of the case (see 6 Tr. 863, 896). Nevertheless, in an abundance of caution, the district court permitted petitioner to reopen the evidence to rebut the officers' testimony; petitioner failed to do so.

"conductors" of an "illegal business" within the meaning of the statute (*id.* at 401-402). At the same time, however, the Tenth Circuit had no difficulty in finding that the two persons who leased the nightclub and owned the fixtures were participants within the meaning of Section 1955 (*id.* at 398, 401).

Here, unlike in *Boss*, the court was not required to determine whether a peripheral actor "conduct[ed]" an illegal gambling business within the meaning of the statute. Rather, the indictment alleged and the evidence showed that petitioner "finance[d], manage[d] * * * or own[ed]" an illegal gambling business. Such conduct lies at the very core of a gambling operation, and, indeed, we know of no case in which a court of appeals has found such participation to be outside the scope of Section 1955.

Beyond this, petitioner cites nothing to suggest that the court here could not have found that petitioner had "actual involvement" in the financing, managing, supervising, directing and owning of the illegal gambling business. As noted in the discussion above, there was certainly evidence of such participation by petitioner. Indeed, in denying the motion for a judgment of acquittal the trial court specifically took note of the facts that petitioner controlled 75% of James Vending Corporation stock, was president of the corporation and personally claimed ownership of the video-display poker machines (5 Tr. 779-780). In short, there is nothing to indicate that the court below applied a standard that conflicts with the standard applied in *Boss*, or that the Tenth Circuit would have reached a different result if it had been considering the facts presented here.[7]

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[7]Without presenting argument, petitioner also alleges (Pet. 4-5) that the court's jury instructions were defective. The first challenged instruction is taken almost verbatim from the statute, and, accordingly, is unexceptionable. The second challenged instruction (7 Tr. 980) was

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1983

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modified at petitioner's request (7 Tr. 990-991) to include the language "knowingly and intentionally" (7 Tr. 998), thus largely conforming with petitioner's requested instruction (Pet. 5). The language of petitioner's proposed instruction that would require a defendant to have made a personal and substantial contribution to the success of the gambling business is unsupported by the language of the statute or by any case law.

DOJ-1983-04